

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF ILLINOIS  
3 WESTERN DIVISION  
4  
5 CITY OF ROCKFORD, ) Docket No. 17 C 50107  
6 Plaintiff, )  
7 vs. ) Rockford, Illinois  
8 ) Tuesday, August 8, 201  
9 MALLINCKRODT ARD, INC., )  
10 et al., ) 9:00 o'clock a.m.  
11 )  
12 Defendants. )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE IAIN D. JOHNSTON

## 10 APPEARANCES:

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Also Present:

MR. DONALD LOHMAN  
In-House Counsel  
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Court Reporter:

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1 (The following is from a tape-recording of proceedings:)

2 THE CLERK: Calling 17 CV 50107, City of Rockford vs.  
3 Mallinckrodt ARD, Inc., et al.

7 All right. Let's try to do this in an orderly  
8 fashion. Let me get appearances for the City of Rockford. I  
9 see Mr. Mogbana.

10 MR. FLOWERS: Good morning, your Honor. Pete Flowers  
11 on behalf of the City of Rockford.

12 THE COURT: Okay.

13 MR. HAVILAND: Don Haviland for the City of Rockford.

14 MR. MINCIELI: Jonathan Mincieli for the City of  
15 Rockford.

16 MR. PLATT: Bill Platt, City of Rockford.

17 THE COURT: Okay. And Mr. Mogbana.

18 All right. I can't find you on this list,

19 Mr. Sullivan.

20 There you are. Okay. Go ahead.

21 MR. SULLIVAN: Good morning. Your Honor, on behalf  
22 of the Mallinckrodt defendants, Scott Sullivan. With me is  
23 Pat Watson, Herbert Giorgio, and in-house counsel, Don Lohman.

24 THE COURT: And then Don. Do I have an appearance?

25 MR. SULLIVAN: He is just here observing, your Honor.

1                   THE COURT: Okay. All right.

2                   United BioSource?

3                   MR. GORMAN: Good morning, your Honor. Eric Gorman,  
4 Skadden Arps, on behalf of United BioSource, and with me is my  
5 partner James Keyte as well as my colleague Evan Kreiner.

6                   MR. KREINER: Good morning.

7                   THE COURT: Good morning. Okay.

8                   All right. I have circled with a star and three  
9 exclamation points in my notes "Need to keep case under  
10 control." So we are going to do that -- or I'm going to do  
11 that. I clearly haven't done it very well so far.

12                  We had a status or a motion previously. We set a  
13 briefing schedule on a 12(b)(2) and a 12(b)(6) motion. I  
14 don't know if I had everybody present. I don't think I had  
15 anybody from United BioSource. For that, you can just send up  
16 Roy Leaf. He can come up. He can say a couple of words. He  
17 can see his mom. Everybody will be happy, okay?

18                  So let's talk about the 12(f), potential 12(f), which  
19 are disfavored and can be useless, and the MJOP. So the  
20 judgment on the pleadings, what are you talking about?

21                  Wait. That came out the wrong way. What would that  
22 entail? What would be the issues?

23                  MR. FLOWERS: We think it is a pretty straightforward  
24 issue in terms of what Mallinckrodt has already agreed to as  
25 part of its resolution with the FTC case. Obviously, there is

1       going to be some factual issues that we were hoping to see  
2       their motion to dismiss to be able to gauge whether, in fact,  
3       we are going to file that motion, but we wanted to put it out  
4       there for the court that if the facts are as we have pled,  
5       that we think a motion for judgment on the pleadings might be  
6       appropriate.

7                   THE COURT:    Okay.  Well, if they are filing just a  
8       motion to dismiss and there is no answer, what would you be  
9       waiting to see?

10                  MR. FLOWERS:  We don't know -- we just saw in their  
11       Rule 26 report statement some of the bases for the Rule 12  
12       motion, despite having a couple of conferences about it.  We  
13       now know that they are challenging standing, Illinois Brick,  
14       and a couple of other fact-laden issues.  So, again, when we  
15       had the conference, your Honor, we thought that it was  
16       appropriate to raise that issue because we think the fact  
17       issues are pretty straightforward, but I do see some factual  
18       contested issues coming down the line, especially our status  
19       as a direct purchaser.  We now see they are going to challenge  
20       that.  We expect they are probably going to put some factual  
21       proffer out there in their Rule 12 motion, and we are going to  
22       want discovery on that.

23                  THE COURT:  Well, the only thing they can add facts  
24       to would be the 12(b)(2).  12(b)(6), they are stuck with  
25       whatever you pled.  So unless you pled really bad things, and

1 I don't know, what would the factual disputes be?

2 MR. FLOWERS: We are comfortable with the pleading.

3 When I saw Illinois Brick and I saw standing in their  
4 defensive posture, which is the statement -- I suppose we are  
5 going to see an argument on that. The facts pled support our  
6 theory.

7 THE COURT: Okay. On the standing, since it is -- I  
8 mean, that can be a 12(b)(1) or a 12(b)(6). It sounds like  
9 you are doing it as a 12(b)(6).

10 MR. WATSON: We are doing it as a 12(b)(6). It is  
11 Illinois Brick, so it is more the elements of a claim than  
12 constitutional standing.

13 THE COURT: Right.

14 MR. WATSON: And we are not intending to put any  
15 factual evidence in. We are going to attack the pleadings as  
16 pled.

17 THE COURT: Okay. Okay. Who was thinking about  
18 doing a motion to strike?

19 MR. WATSON: That was Mallinckrodt.

20 THE COURT: And what would be the basis?

21 MR. WATSON: It was going to be a narrow motion to  
22 strike the allegations that were taken from the FTC complaint.  
23 There is some very good authority from the Northern District  
24 of Illinois on that point recognizing that all the -- such  
25 motions are generally disfavored, that in that circumstance, a

1 motion to strike is appropriate, and I would note that the  
2 consent order in this case specifically says on its face that  
3 it is not to be used in evidence in any civil proceeding or  
4 other proceeding going forward. So that's what the motion to  
5 strike would deal with.

6 THE COURT: Okay. All right. If you win on a motion  
7 to strike, does it advance the case?

8 MR. WATSON: It narrows the issues in our opinion.

9 THE COURT: Can't they just come back with something  
10 else?

11 MR. WATSON: Possibly. They could replead it in a  
12 certain way, but that's always the danger on a motion to  
13 dismiss in general.

14 THE COURT: Well, that's true.

15 So if there were going to be cross motions, I just  
16 would have had a briefing schedule and had everybody hit the  
17 launch button at the same time, and then you guys can throw  
18 the paper back and forth at each other for however long it  
19 takes to work out the pleadings, and then hopefully it will be  
20 one organized, giant stack of paper before Judge Kapala  
21 instead of a series of different ones he has got to wade  
22 through.

23 Do you still anticipate a judgment on the pleadings  
24 motion?

25 MR. FLOWERS: No, your Honor --

1                   THE COURT: Okay.

2                   MR. FLOWERS: -- based on what we have seen through  
3 our Rule 26(f) conference.

4                   THE COURT: All right. Let's see if I can get the  
5 complaint up.

6                   The class -- obviously, the City of Rockford is the  
7 class rep in this case. Are there going to be -- when I read  
8 the class rep definition, it seemed like it could include  
9 other Illinois municipal bodies. Could it?

10                  MR. FLOWERS: That's correct, your Honor.

11                  THE COURT: All right. How about other municipal  
12 bodies outside Illinois?

13                  MR. FLOWERS: Yes.

14                  THE COURT: Okay. I don't know municipal law outside  
15 Illinois. I only know Illinois municipal law. So under  
16 Illinois municipal law, can a municipal body be included in a  
17 class action when it is only an opt-out class?

18                  MR. FLOWERS: So there have been --

19                  THE COURT: Municipal body needs to -- can only act  
20 through the corporate authorities -- village board, city  
21 council, those types of things, county board -- and it needs  
22 to take an affirmative step to enter litigation. If it is  
23 knocked out, how do we work that?

24                  MR. FLOWERS: So they are having classes certified in  
25 the drug arena for just that. There has been a case where the

1 City of San Francisco sued, was certified as a class  
2 representative in an opt-out (b)(3) situation where the  
3 municipal authority has to elect to opt out of the case in  
4 order to capture the entire marketplace.

5 THE COURT: And would that be San Francisco? Unless  
6 there is a city of San Francisco in Illinois, and I don't know  
7 of one. Did that include Illinois municipalities? I mean, I  
8 don't know California law --

9 MR. FLOWERS: Yes, your Honor.

10 THE COURT: -- municipal law.

11 MR. FLOWERS: What I'm suggesting is this is a very  
12 finite group of people. The class is not as expansive as you  
13 may see in other cases. We have got about 800 or so patients  
14 a year. So the payors are very limited, too. So I would say  
15 that the vast majority of municipalities are likely not in the  
16 class. So we are dealing with a very finite group of people.  
17 It just so happens the City of Rockford has two patients in  
18 one calendar year. So it has a very strong position as a  
19 representative plaintiff in this case.

20 THE COURT: Okay. What I don't want  
21 happening -- going back to my "keep the case under control,"  
22 what I don't want happening is municipalities coming in at the  
23 end of the process saying, "Hey, we didn't want to be part of  
24 this class. We got notice." Anybody who did Illinois  
25 municipal law knew there was a whole thing with the Ford

1     Intruders and Ford deciding not to sell Intruders to municipal  
2     bodies, and then they all said, "Well, we didn't know we were  
3     part of a class member," and there was a huge dustup, and it  
4     sent the case into chaos. I don't want the case ever going  
5     into chaos, so that's why I'm raising it now.

6                   All right. There is three other cases that may or  
7     may not be a parallel proceeding. Do you think they are?

8                   MR. FLOWERS: We think they are.

9                   THE COURT: Okay.

10                  MR. FLOWERS: The obvious one is the FTC case where  
11     Mallinckrodt was prosecuted by the FTC and settled, and that  
12     gets us right to the body of the evidence that we think we  
13     should have at this point in time so we can stand in the shoes  
14     where the FTC left off.

15                  The next case is the civil action that was brought by  
16     a competitor, Retrophin, which takes us back to the beginning  
17     of where we think the monopolization happened because Questcor  
18     came in and took the competitive drug from Retrophin, and they  
19     were accused by none other than Martin Shkreli as being a  
20     price gouger.

21                  And then the last case is the prosecution of  
22     Mr. Shkreli himself, which if you read the headlines, he was  
23     convicted on three counts, and he is awaiting sentencing.  
24     This morning I saw a calendar, your Honor, that kind of  
25     tracked our schedule, for briefing on posttrial issues in the

1 Shkreli case, on our track into October. Our main concern  
2 with that -- I know your Honor wants to hear issues -- is we  
3 think Mr. Shkreli is a fact witness, and we would rather have  
4 him out of jail rather than in jail, and we would like to  
5 reach out to his counsel about scheduling a deposition at a  
6 convenient time.

7 So we think all of those cases are related because  
8 they all revolve around the Acthar monopolization claim that  
9 we brought.

10 THE COURT: Can he take 5 at this point?

11 MR. FLOWERS: I don't believe so. He has been  
12 prosecuted.

13 THE COURT: Are they going to -- was he found not  
14 guilty on those other five counts or was it a mistrial?

15 MR. FLOWERS: He was found not guilty on three  
16 counts, but there is a civil action by the company against him  
17 individually, which was stayed, I believe, pending the  
18 resolution of the criminal case.

19 THE COURT: Okay. All right. You say they are not  
20 parallel?

21 MR. WATSON: We say they are not parallel. Start  
22 with the easy ones. The Shkreli criminal prosecution,  
23 obviously, has nothing to do with this litigation. It is a  
24 different company. The charges have nothing to do with the  
25 allegations in this case, which have to do with a distribution

1 system that Mallinckrodt has for its drug Acthar and the  
2 acquisition of a potentially competitive drug by a license  
3 agreement.

4 The civil case that they are talking about, the  
5 Retrophin case, it is -- again, in some far off sense you  
6 could say it is relevant because they have copied the  
7 allegations from that case in some ways. We think those get  
8 knocked out on the motion to dismiss.

9 And then the third one is the FTC investigation,  
10 which is, as we have already said, the consent order on its  
11 face can't be used in this litigation. So this isn't like a  
12 DOJ investigation with the guilty plea where you have some  
13 legal significance of the guilty plea and follow-on antitrust  
14 litigation. The FTC consent order has no such effect.

15 THE COURT: Okay. The FTC litigation, there is a  
16 consent order. It sounds like it settled. Is there a  
17 judgment in that or does the consent order have a period of  
18 time by which it extends into the future?

19 MR. WATSON: Do you know the answer to that one, Don?

20 MR. LOHMAN: Six months.

21 MR. WATSON: It is just a consent order. There is no  
22 judgment. We had, as part of the consent order, the company  
23 had to pay a fine, and they had to license the product at  
24 issue, which has now been done.

25 THE COURT: Okay. Has the case been terminated? If

1 I were to go onto the docket system, would it show terminated?

2 MR. WATSON: I was not involved in that, your Honor.

3 MR. LOHMAN: I don't know, your Honor.

4 THE COURT: Okay. All right. Okay. Those were my  
5 questions. It looks like you have got a lot of fact  
6 witnesses, potential experts. I assume you are going to have  
7 retained experts on if the antitrust matter goes forward. You  
8 are going to have experts on that.

9 Are the parties interested in a settlement conference  
10 at all? We don't have to have one, but if you want one, I  
11 will make myself available.

12 MR. FLOWERS: Your Honor, from the plaintiff's  
13 perspective, we are open and available to discuss anything at  
14 any point in time. We were under the impression that at least  
15 one of the defendants wasn't interested at this point,  
16 although they put something in their Rule 26 disclosure which  
17 seems to indicate that we hadn't given a concrete settlement  
18 proposal, but, in fact, we were of the opinion based on our  
19 conversation that they weren't interested in having  
20 discussions at this stage.

21 THE COURT: Okay. I'm not going to -- look,  
22 Mr. Sullivan will tell you I don't make anybody come to a  
23 settlement conference. If both sides want to have a  
24 settlement conference, you can have a settlement conference.

25 MR. WATSON: And I think he was talking about UBC and

1 not Mallinckrodt, but we -- I think both -- our position is we  
2 are always willing to consider settlement offers. We think  
3 the chances of this case settling prior to ruling on the  
4 motion to dismiss is remote. So I wouldn't think that having  
5 a formal ADR process or anything like that would be worthwhile  
6 at this point.

7 THE COURT: Okay. All right. Those are my  
8 questions.

9 Tell me whatever you want to tell me.

10 MR. FLOWERS: Your Honor, I think one issue is this  
11 whole issue of discovery at this stage. So we both kind of  
12 agree that the timetable of this case, assuming it goes  
13 forward, is about 14 months. The question is --

14 THE COURT: Let me pause you right there.

15 MR. FLOWERS: Sure.

16 THE COURT: I'm looking at a sea of lawyers. Just  
17 scheduling depositions with this many attorneys -- I figure  
18 you all have probably a couple other cases pending -- 14  
19 months seems pretty optimistic.

20 So go ahead. That's just my word of caution.

21 MR. FLOWERS: Possibly, your Honor, you are right, it  
22 is a scheduling nightmare. The question, though, in that  
23 respect is when does the 14 months begin. I mean, we have  
24 issued our Rule 26 disclosures even though we couldn't get an  
25 agreement on how to do that. We have issued discovery.

1                   THE COURT: Okay. So that would be another good  
2 piece of evidence as to whether 14 months is really reliable  
3 if you can't agree on stuff like that. But go ahead.

4                   MR. FLOWERS: True, true.

5                   The issue really is when does discovery begin, does  
6 it begin after the motion to dismiss is dealt with or does it  
7 begin at this stage. Our position, at least, is some of the  
8 simple discovery should begin at this stage so that we can get  
9 the process moving. It isn't discovery that requires probably  
10 a lot of action on their behalf because it is mostly documents  
11 that have been gathered in these other cases, so they have  
12 been previously produced. So we are of the opinion and hope  
13 that we could begin at least the simple part of the discovery  
14 at this stage so that the case can move along, assuming we get  
15 over the motion to dismiss.

16                  MR. HAVILAND: And, your Honor, if I may, to follow  
17 on that, what Mr. Flowers pointed out, there are buckets of  
18 documents. I don't want to oversimplify it. But in the FTC  
19 litigation where Mallinckrodt PLC agreed to jurisdiction, we  
20 believe there is a body of documents that led to that  
21 decision. They ultimately did settle with the FTC over those  
22 charges. We expect in the 12(b)(2) motion to hear that there  
23 is no jurisdiction here and the reasons for it. That's going  
24 to beg the question about jurisdictional discovery. But if we  
25 can at least start where the government left off with a

1 consent that the company was here for purposes of that case,  
2 we think we can at least get down the pathway of helping the  
3 court to resolve that jurisdictional motion, among other  
4 things, but it is a body of documents that exists somewhere in  
5 counsel's office.

6 THE COURT: Okay. Let's go down the jurisdictional  
7 rabbit hole. They are going to be filing a 12(b)(2) motion,  
8 its motion unopposed, all motions to dismiss by 8/22. Okay.

9 In a couple weeks, he will be filing a 12(b)(2). You  
10 haven't seen it yet?

11 MR. HAVILAND: Correct.

12 THE COURT: I assume your crystal ball is at the  
13 shop. It isn't working. But do you think you are going to  
14 ask for or need jurisdictional discovery or do you need to see  
15 the motion first?

16 MR. HAVILAND: Likely.

17 THE COURT: Bad question by me because it is  
18 compound.

19 Do you think you will need jurisdictional discovery?

20 MR. HAVILAND: More than likely, your Honor, based on  
21 what we expect they are going to claim about the Irish  
22 company's presence in the United States and the jurisdiction  
23 of this court.

24 THE COURT: Okay.

25 MR. GORMAN: Your Honor, if I could just have a word

1 on United BioSource.

2 THE COURT: Sure.

3 MR. GORMAN: You know, frankly, we don't even  
4 understand why we are named in this case. There is really no  
5 antitrust theory that has us in here. We will have a very  
6 strong 12(b)(6) motion. We don't think there should be any  
7 discovery for any defendant going forward, but certainly until  
8 those motions are decided. But certainly for UBC, it makes no  
9 sense whatsoever.

10 THE COURT: Well, are you raising a 12(b)(2) motion?

11 MR. GORMAN: 12(b)(6).

12 THE COURT: You are just -- you are 12(b)(2),  
13 12(b)(6). You are 12(b) --

14 MR. GORMAN: 12(b)(6).

15 MR. WATSON: Right. We are 12(b)(2) for the parent  
16 company only, 12(b)(6) for both.

17 THE COURT: Okay.

18 MR. WATSON: And I obviously join in the position  
19 that the defendants should not be subject to discovery until  
20 the motions to dismiss are ruled on. The court and everyone  
21 who practices in federal court is familiar with the Twombly  
22 case, and this is what the Twombly case was all about,  
23 stopping the runaway train that can become antitrust discovery  
24 before the court has had an opportunity to rule on the  
25 plausibility of the allegation, and we have a relatively quick

1 schedule here. I think briefing will be complete by  
2 October 31st. So there is a very short time period during  
3 which discovery can be stayed, but it is not -- the discovery  
4 requests that have been served on us to date are anything but  
5 simple. It goes far beyond anything that was produced in  
6 prior cases. And even with respect to things that were  
7 produced in prior cases or to the FTC, it is not as easy as  
8 just pushing a button, and they are certainly not sitting in  
9 counsel's office.

10 But nonetheless, it has to do with more than how fast  
11 it is or how expensive it is. It is also intrusive discovery.  
12 There is no legitimate reason to begin discovery now as  
13 opposed to after a ruling on the motion to dismiss, when it is  
14 our belief that the entire case will be dismissed. But even  
15 if it wasn't, the issues would be significantly narrowed.

16 THE COURT: Okay. I never knew a defendant who filed  
17 a motion to dismiss that didn't think it would be successful,  
18 even when I filed them. I would cross my fingers.

19 MR. WATSON: We strenuously think it will be  
20 successful.

21 THE COURT: You do have a briefing schedule on those  
22 motions, even if the 12(b)(6) moves forward. It takes you all  
23 of November, all of December. My best guess -- there is a lot  
24 of other motions that are in the queue in front of your  
25 motion, including one of yours -- a couple of yours. You have

1   got a changeover in personnel over there. Optimistically, you  
2   are looking the end of February. That's my best guess.

3                    MR. GORMAN: I think, your Honor -- sorry to  
4   interrupt -- in the context of what will not be a 14 months'  
5   case, I think it will be a couple year case, waiting for these  
6   motions to be decided, I think, is very much and probably the  
7   most efficient way to approach what will become quite a  
8   complex and long case, and can be very much informed whether  
9   it is a complete dismissal or a narrowing of the issues from  
10   these motions.

11                    MR. HAVILAND: Your Honor, one of the --

12                    THE COURT: Hold on. I don't think he's finished.

13                    MR. HAVILAND: I'm sorry.

14                    MR. GORMAN: So I think in this type of very  
15   complex -- again, from our perspective, UBC's perspective, it  
16   is not complex, but looking at the overall case, an antitrust  
17   case, you know, it does very often make great sense to hear  
18   these motions, get decisions on these motions before you  
19   launch into a very long, complex litigation involving experts,  
20   fact issues. It can be informed quite a bit by the motion  
21   practice.

22                    THE COURT: Okay. What are we talking about as far  
23   as ESI goes? Are they going to be electronically stored  
24   information?

25                    MR. HAVILAND: We have broached the topic. We didn't

1 get very far on it. We don't have an EDP plan in place. We  
2 have imposed a litigation hold. I expect defense counsel has  
3 done the same. But we haven't moved forward other than we  
4 have done our due diligence on the plaintiff's side. We have  
5 actually produced, as Mr. Flowers said, our Rule 26  
6 disclosures. We have propounded discovery, interrogatories  
7 and requests for production of documents, which are due next  
8 week. And I wanted to say, your Honor, that there is  
9 disclosed in the Rule 26(f) report a motion for a stay of  
10 discovery. We have not seen that. I expect it is along the  
11 lines of what we have heard today that there is a motion  
12 coming to dismiss. We would like to stay discovery, but we  
13 are going to have a deadline on discovery responses coming due  
14 next week and a motion to stay that hasn't been filed yet. We  
15 don't want to file a motion to compel and start the flood of  
16 more motions for the court. So we would like to kind of --

17 THE COURT: I haven't even set a case management  
18 order. So now you can file your Rule 34 motions -- or  
19 motions -- or requests for documents early, but  
20 interrogatories, you need to wait. I think you kind of jumped  
21 the gun on that one, right?

22 MR. HAVILAND: Yes, your Honor.

23 MR. GORMAN: They actually filed interrogatories and  
24 document requests while we were on the 26(f), which shows you  
25 how aggressive they want to be on discovery. I'm not faulting

1 them on that.

2 I would say that we are happy to brief this issue.

3 We are happy to file the motion.

4 THE COURT: We don't --

5 MR. WATSON: I think the idea was if they got the  
6 ball rolling, maybe it won't stop, but, again, it makes  
7 perfect sense not to even have that ball start to roll.

8 THE COURT: I don't want briefs on a stay because  
9 then you will file, and then they will file, and then you will  
10 have a reply. I pretty much know what I'm going to do on  
11 this, but I want to hear from the parties before I make a  
12 decision.

13 MR. FLOWERS: So, your Honor --

14 THE COURT: It is kind of the right way to do it.

15 MR. FLOWERS: -- the discovery that we have  
16 propounded, it has a dozen or so requests. The first couple  
17 were tailored to those files in the FTC action, in the  
18 Retrophin action, as I said. They were litigated cases to  
19 resolution. The discovery in those cases is finite. It has  
20 been produced. It is not burdensome to reproduce it.

21 We believe in those two case files we are going to  
22 find much of what we need to get down the pathway, and we  
23 would like to start that process now. That's why I was  
24 curious as to the basis for the stay. If it is burden, I  
25 don't think the burden is all that oppressive to produce a

1 case file that's already in existence, and we can talk to  
2 counsel about that, how we copy it if it is in electronic  
3 form, all those issues, but we didn't get very far on that,  
4 other than to disclose our desire to get finite discovery.

5 THE COURT: Okay. Look, if there is going to be ESI  
6 issues, go to [discoverypilot.com](http://discoverypilot.com). Go to the Seventh Circuit  
7 ESI program. We have got all kinds of materials on there to  
8 make it a process.

9 If they are used and reviewed and thought about and  
10 cooperated with by the parties, try to make it as -- I can't  
11 say "un-painful" -- less painful as possible. So that will  
12 give you some guidance there.

13 If you need a protective order at any time, use the  
14 model protective order that's on the court's website. Show me  
15 your changes in the tracked changes, and I will review it and  
16 get that back to you that same day probably.

17 I can tell you this: There is going to be no  
18 depositions before the motions to dismiss are ruled on. I can  
19 guarantee you that. That's not going to happen.

20 You have served -- I got the certificate of service  
21 that you served your 26(a) disclosures. That was just handed  
22 to me this morning.

23 Here is what we are going to do: I have got the  
24 certificate of service. I don't know what you got, when you  
25 got it, the volume. Did you get 26(a) disclosures?

1                   MR. GORMAN: We got the 26(a) disclosures yesterday,  
2 and it was two or three pages, and then an exhibit of, I  
3 think, 33 witnesses that they have identified.

4                   MR. WATSON: And, your Honor, from our perspective,  
5 again, getting into document production and finding and  
6 reviewing documents as opposed to, potentially, as a middle  
7 ground, some disclosures with categories of documents and  
8 names, we can understand that is a possibility. But headed  
9 down the road in the context of our motion to dismiss, of  
10 actually searching, producing, reviewing documents, it just  
11 doesn't make any sense to us.

12                  THE COURT: Okay.

13                  MR. WATSON: And we don't have the same issues, also,  
14 in terms of having FTC complaints and things that people want  
15 that can be gathered. We have just a simple, straightforward  
16 motion to dismiss.

17                  THE COURT: Okay. Simple, straightforward.

18                  MR. WATSON: Wait until you see it.

19                  THE COURT: I'm not going to look at.

20                  MR. WATSON: I know.

21                  THE COURT: It is going to that chambers. I'm not  
22 touching it.

23                  MR. FLOWERS: Not that yours is not.

24                  MR. WATSON: And I just want to emphasize, again,  
25 that this is the classic case where discovery is going to be

1 stayed. It is Twombly. This is Sulfuric Acid from the  
2 Northern District of Illinois. Antitrust cases, complex  
3 antitrust cases, are cases that cry out for discovery stayed.

4 THE COURT: I don't know how many opinions Judge Cole  
5 issued in the sulfuric acid cases. A lot. So that's a bad  
6 cite.

7 MR. WATSON: I could probably give you the actual.

8 THE COURT: It was a lot.

9 MR. WATSON: It was from 2008.

10 THE COURT: I cite Judge Cole's opinions in that case  
11 all the time, so there were clearly a lot of discovery issues.

12 MR. WATSON: Do you want -- the cite is 231 --

13 THE COURT: I have got it. I have got it.

14 MR. WATSON: Okay.

15 THE COURT: 26(a)(1) disclosures by September 29th,  
16 okay? Full 26(a)(1) disclosures.

17 I have no idea if there is any insurance coverage on  
18 any of this stuff. Has a claim been made?

19 MR. WATSON: I don't know the answer to that, but I  
20 doubt it.

21 THE COURT: Well, obviously, if there is, let them  
22 see the policy. That would be fun to have a carrier in on  
23 this case.

24 And then what we will do is we will sit down. I'm  
25 going to give you October 10th. I will put it at 1:30. And

1 that will be -- I will put that as the only case on the 1:30  
2 call that day. And I will be tired and cranky, so I'm giving  
3 you a warning, on that day. And we will talk about what, if  
4 any, additional discovery should move forward. There will be  
5 no depositions before the motions to dismiss are completed.  
6 As to if and when depositions do proceed, I will put in the  
7 order right now, so I don't forget, leave to depose an  
8 incarcerated person will be allowed under Rule 30.

9 With this many attorneys, come up with a plan.  
10 Mr. Mogbana knows my theory on it. Pick either the first or  
11 the last week of each month, and you say, "This is going to be  
12 the Mallinckrodt week where deps are." I don't care where.  
13 Just set aside some time so that you have a block of time, and  
14 that will be when your deps are, so that you are not trying to  
15 figure out everybody's schedule. You just go on to your  
16 system and block it off, and then you will have your deps,  
17 whatever is agreeable, first, second, third week, whatever you  
18 want to do, every other week, something, just so you have some  
19 consistency. Otherwise, you are going to spend countless  
20 hours and a lot of your clients' time and money scheduling  
21 depositions, which is not a good use of anybody's resources.

22 So we will talk on October 10th in the afternoon  
23 about what, if any, additional discovery will proceed. If  
24 there are documents that are available, that are not difficult  
25 to obtain, and there is not a lot of burden, if there is an

1     FTC file somewhere in Iron Mountain, and all you have got to  
2     do is pull it out, and it is relevant, that doesn't seem  
3     onerous and it seems proportionate. If it is going to involve  
4     searching ten mainframes for e-mails of 12 custodians, that's  
5     a different issue. So you have got the two ends of the  
6     spectrum. So we will talk about it at that point, but  
7     at least you will have the opportunity to review the 26(a)(1)  
8     disclosures. You will, too. And so I think you will be  
9     better informed on what, if any, discovery would proceed on  
10    that date. You should probably talk to each other before we  
11    sit down on the 10th. Just get the protective order on file  
12    so that doesn't hold you up.

13                   I'm not saying that discovery is moving forward, but  
14    it is not hard. The reason we have the model protective order  
15    is to save the countless hours. I don't know how many hours  
16    we used to fight over stupid protective orders and they all  
17    end up looking the same anyway.

18                   MR. WATSON: Just to clarify a point, does that mean  
19    that we do not need to respond to the discovery that was  
20    served, that answers are due next week?

21                   THE COURT: Correct.

22                   MR. WATSON: Thank you, your Honor. Thank you.

23                   THE COURT: But I do want to hear about that FTC  
24    case, what the documents -- what the discovery looked like in  
25    that case. To the extent that there is any overlap, this

1       Retrophin, it is a 2014 case in California -- nope -- yes, is  
2       that still going on? Is that ongoing or is it --

3                    MR. WATSON: That case is over.

4                    THE COURT: Is it settled?

5                    MR. LOHMAN: It was settled two years ago, more than  
6        two years ago.

7                    THE COURT: Okay. Okay. So the same thing with  
8        that. I don't know what the discovery requests looked like in  
9        that. I mean, if they just went to school and took a look at  
10      what was filed in that case -- I don't know if you are the  
11      same counsel -- and they just went, "Wow, this is good  
12      discovery," and they lobbed that over to you and you had to  
13      respond to it, well, again, proportionality, maybe it is not  
14      disproportionate to say, "Here you go."

15                  Now, if they were or if they had those documents,  
16        then they don't need to get them from you again, okay? So we  
17        will talk through those things on the 10th in the afternoon.

18                  Any questions you have of me?

19                  MR. FLOWERS: The only concern I wanted to raise for  
20        the court is with the 12(b)(2) motion and the issue of  
21        jurisdictional discovery. If there are positions  
22        taken -- typically, I'm not going to suggest what the defense  
23        counsel is going to do here, but if there is an affidavit  
24        about the company's lack of contacts in Illinois, we are going  
25        to want to respond to that and probably be seeking discovery

1 on those issues.

2 THE COURT: Hold on one second.

3 MR. FLOWERS: In the context of the briefing, which  
4 is due October the 3rd.

5 THE COURT: And then your response is on the 31st.

6 So we can talk about that on the 10th as well.

7 MR. FLOWERS: Yep.

8 THE COURT: Okay.

9 MR. FLOWERS: Thank you.

10 THE COURT: Anything from you guys?

11 MR. GORMAN: Nothing from us, your Honor.

12 THE COURT: All right. Have a good day.

13 (Which were all the proceedings heard.)

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript from  
16 the digital recording of proceedings in the above-entitled  
17 matter to the best of my ability, given the limitations of  
18 using a digital-recording system.

19

20 /s/ Heather M. Perkins-Reiva August 14, 2017

21 Heather M. Perkins-Reiva Date  
22 Official Court Reporter

23

24

25